BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	DOCKET FILE COPY ORIGINAL
	)	
Promotion of Competitive Networks In Local Telecommunications Markets	)	WT Docket No. 99-217
	)	
Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules To Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed To Provide Fixed Wireless Services	)	RECEIVED SEP 27 1999 FEDERAL COMMUNICATIONS COMMISSION OFFICE OF THE SECRETARY
	)	
Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules To Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes And Assessments	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act Of 1996	)	CC Docket No. 96-98

TO: The Commission

REPLY COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

The Competitive Telecommunications Association ("CompTel"), by its attorneys, hereby replies to the comments submitted in the above-captioned proceedings. CompTel joins with those parties who support the rules and policies the Commission has proposed to ensure that competitive local exchange carriers ("CLECs") have reasonable and non-discriminatory access to multiple tenant environments ("MTEs") for the provision of competitive local services.[1] For the sake of brevity, CompTel only expresses here its agreement with parties who urge the

[1] *See, e.g.*, NextLink Comments at 3-14; Teligent Comments at 2-74; WinStar Comments at 23-64.

Commission to adopt a broad interpretation of Section 224 and who believe that its application as proposed will not effect any takings of the property of MTE owners, constitutional or otherwise.[2]

CompTel explained in its initial comments that the Commission has ample authority to adopt rules implementing Sections 224(f)(1) and 251(c)(3), and that the public interest would be best served by rules that allow CLECs to choose which of these provisions is appropriate to gain access to individual MTEs. Although the ILECs and owners of MTEs would have the Commission take a narrow view of its authority under these sections, many parties agree with CompTel's conclusion that the Commission's proposals are not only legally sound, but also necessary to fulfill its responsibility under the Telecommunications Act of 1996 ("1996 Act") to foster competition by ensuring that CLECs have access to Americans who live in MTEs.[3]

I. THE COMMENTS REFLECT STRONG SUPPORT FOR A BROAD INTERPRETATION OF SECTION 224(F)(1)

In its initial comments, CompTel urged the Commission to construe broadly Section 224(f) to require ILECs to make any and all of their MTE access rights available to CLECs.[4] This "piggyback" option should include any type of conduit or right of way, including house cables, riser cables, and access to rooftops and telecommunications closets, and should

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2 In light of the pending release of the Commission's order adopting rules on unbundling of network elements, *FCC Promotes Local Telecommunications Competition: Adopts Rules on Unbundling of Network Elements ("UNEs")*, News Release, Rep. No. CC 99-41 (rel. 9/15/99), CompTel does not discuss the application of 47 U.S.C. § 251(c)(3) in these reply comments. We believe that the Commission and all parties to this proceeding should have an opportunity to address these issues after they have fully reviewed the Commission's UNE order.

3 *See, e.g.*, NextLink Comments at 3-14; Teligent Comments at 2-74; WinStar Comments at 23-64.

4 *See* CompTel Comments at 7-10.

encompass any access right the ILEC possesses, regardless whether it has yet exercised the right. Although the ILECs and MTE owners predictably favor a narrow interpretation of Section 224(f)(1), several parties agree with CompTel that Congress intended Section 224 to impose a broadly applicable obligation of nondiscriminatory access so that the 1996 Act's promise of competition can be fulfilled.[5] CompTel agrees with those parties who urge the Commission to clarify that rights under Section 224 apply to all facilities-based carriers, whether wireline or wireless.[6] Only if the Commission adopts the clarifications that it proposes in the NPRM will Section 224 serve its purpose of fostering competition by allowing telecommunications carriers to reach the customers who want their services.

In their comments, the ILECs try to insert the term "public" before the term "rights-of-way" in Section 224 in order to limit its scope.[7] However, nothing in Section 224 limits its application to "public" rights-of-way. Rather, Section 224 requires a utility to provide nondiscriminatory access to "*any* pole, duct, conduit, or right-of-way owned or controlled by it,"[8] regardless whether it is on public or private property. If Congress had wanted to limit the application of Section 224 only to public property, it would have done so explicitly as it did in

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5 *See, e.g.*, AT&T Comments at 9-23; MCI WorldCom Comments at 8-13; Teligent Comments at 2-74; WinStar Comments at 2-64.

6 *See, e.g.*, NextLink Comments at 9; WinStar Comments at 52.

7 *See, e.g.*, Bell Atlantic Comments at 7 (arguing that Section 224 only applies to "public rights-of-way"); BellSouth Comments at 12 (same); USTA Comments at 9 (same). Rather than looking to the plain language of Section 224, parties like BellSouth would have the Commission isolate individual terms (*e.g.*, "rights-of-way"), remove them from the context of Section 224, and interpret them based on cases interpreting unrelated statutory provisions (*e.g.*, 47 U.S.C. § 621(a)(2)). Given a choice between an interpretation based on plain language that furthers the goal of the statute and one based on legal definitions from an unrelated statute that frustrates the goal of the statute, CompTel submits that the Commission must choose the plain language interpretation that furthers the goal of the statute. Therefore, CompTel urges the Commission to reject the interpretations of Section 224 proposed by parties like Bell Atlantic, BellSouth, and USTA.

8 47 U.S.C. § 224(f) (emphasis added).

Section 253(c).[9] CompTel thus submits that the language of Section 224 is unambiguous, and it applies to both public and private property. To the extent the Commission finds that the language of Section 224 is ambiguous, however, it must consider the relevant statutory context, which also compels the conclusion that Section 224 applies to both public and private property.[10] Therefore, CompTel agrees with those parties who support the Commission's tentative conclusion that, "so long as a utility uses any pole, duct, conduit or right-of-way for wire communications, . . . all rights-of-way that it owns or controls, whether publicly or privately granted, and regardless of the purpose for which a particular right-of-way is used, are subject to Section 224."[11]

CompTel also agrees with those parties who support the Commission's conclusion that Section 224 "encompasses a utility's obligation to provide cable television systems and telecommunications service providers with access to property that it owns" when the utility "uses its own property in a manner equivalent to that for which it might obtain a right-of-way from a private landowner."[12] The term "right-of-way," which can refer to "the land

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9 47 U.S.C § 253(c) ("[n]othing in this section affects the authority of a State or local government to manage the *public* rights-of-way") (emphasis added). *See Consumer Product Safety Comm. v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1982) ("[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."); *Richards v. U.S.*, 369 U.S. 1, 9 (1962) ("[T]he legislative purpose is expressed by the ordinary meaning of the words used.").

10 *See, e.g.*, AT&T Corp., et al. v. Ameritech Corp. et al., 13 FCC Rcd 21438 (1998) ("We conclude that, in the context of our interpretation of section 271(a), the term 'provide' is ambiguous. Accordingly, using the traditional tools of statutory construction, we look next to the context in which the term is used and any relevant legislative history to determine a reasonable meaning.") (citations omitted).

11 NPRM, ¶ 41. *See, e.g.*, AT&T Comments at 14-16; Teligent Comments at 34-35; WinStar Comments at 54-56.

12 NPRM, ¶ 43; *See, e.g.*, AT&T Comments at 14-17; WinStar Comments at 56.

itself, not the right of passage over it,"[13] is entirely consistent with the broad scope of Section 224, which requires a utility to provide access to "*any* . . . right-of-way" that it owns or controls.[14] Therefore, the Commission should reject arguments for a cramped interpretation of Section 224, and conclude that a utility is using its own property "in a manner equivalent to a right-of-way" whenever the utility has engaged in conduct on its own property for which it generally would need to obtain a right-of-way if the utility were to attempt to engage in similar conduct on the property of another (either a public or private landowner).[15]

Likewise, nothing in Section 224 limits its application to "underground" conduit as some parties claim. By its terms, Section 224 requires a utility to provide access to "*any* . . . conduit . . . owned or controlled by it . . . ."[16] Therefore, CompTel agrees with several parties that the Commission should reject any attempt to limit the application of Section 224 solely to underground conduit as inconsistent with the plain terms of the statute.[17] Moreover, limiting the term "conduit" solely to "underground conduit" is inconsistent with industry practice, which uses the term to refer to many types of conduit, including "riser conduit." Consequently, the Commission is correct to amend its definition of "conduit" to be consistent with the plain language of Section 224, and BellSouth's claim that the Commission is "flip-flopping" is entirely without merit.[18]

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13 Black's Law Dictionary at 1326 (6th ed. 1990). *See City of Manhattan Beach v. Sup. Ct. of L.A.* County, 914 P.2d 160, 166 (Ca. 1996) (holding that the term "right-of-way" is of "a twofold signification. It is used indiscriminately to describe, not only the easement, or special and limited right to use another person's land, but as well the strip of land itself that is occupied for such use."). *See also, e.g.,* AT&T Comments at 15-18; Teligent Comments at 26-28; WinStar Comments at 56, n.158.

14 47 U.S.C. § 224(f)(1) (emphasis added).

15 NPRM, ¶ 43.

16 47 U.S.C. § 224 (emphasis added).

17 *See, e.g.,* AT&T Comments at 18-19; MCI WorldCom Comments at 10-11; WinStar Comments at 60.

18 *See* BellSouth Comments at 12.

CompTel also agrees with those who believe that Commission guidance regarding the existence and scope of ownership or control under particular circumstances is necessary and appropriate.[19] In fact, CompTel submits that these issues can only be addressed at the federal level, because the scope of a utility's obligation to provide nondiscriminatory access pursuant to Section 224 is a question of federal law. Accordingly, CompTel urges the Commission to clarify that the "owned or controlled" requirement of Section 224 is satisfied where a utility has a private agreement allowing it access to a "pole, duct, conduit, or right-of-way," because the material issue under Section 224 is the existence of ownership and control, not the means by which ownership and control was obtained. Specifically, a utility should be deemed to have ownership or control over a duct conduit, or right-of-way when it has obtained (by whatever means) the right to use[20] that duct conduit or right-of-way to provide service. Moreover, a utility with a right to use a pole, duct, conduit, or right-of-way has sufficient ownership or control regardless whether it has actually exercised that right.[21] This interpretation is most consistent with the plain language of Section 224 and Congressional intent to foster competition.

II. MANY PARTIES AGREE THAT THE COMMISSION'S PROPOSALS WILL NOT EFFECT A TAKING

In its initial comments, CompTel explained that no interpretation of "ownership" or "control" that is consistent with Section 224(f) could result in a "taking" of a building owner's property, and that the Commission's proposals were consistent with Section 224(f). CompTel

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19 *See, e.g.*, AT&T Comments at 19-22; Teligent Comments at 32-34; WinStar Comments at 62-64.

20 *Cf.* Comments of Cincinnati Bell Telephone at 2-3 (arguing that when an ILEC is simply allowed to use a conduit it neither owns nor controls it).

21 *See, e.g.*, AT&T Comments at 21; MCI WorldCom Comments at 11. CompTel also agrees with parties who urge the Commission to interpret Section 224 to include right-of-way on rooftops. *See, e.g.*, WinStar Comments at 56-60.

also agrees with other parties that ordering utilities pursuant to Section 224(f) to exercise whatever expansion abilities they have on behalf of new entrants does not raise takings issues.[22]

CompTel recognizes that, although Section 224(f) applies only to rights possessed by a utility, implementation of Section 224(f) can also affect the interests of building owners.[23] However, implementation of Section 224 does not effect a *per se* taking because "where [a] private property owner voluntarily agrees to the possession of its property by another, the government can regulate the terms and conditions of that possession without effecting a per se taking."[24] Consequently, CompTel agrees with those parties who argue that discussion of *per se* takings and the Supreme Court's decision in *Loretto*[25] is a red herring.[26]

Likewise, the Commission need not be concerned that any of its proposals, or those of CompTel, will effect a regulatory taking under the *Penn Central*[27] standard.[28] These proposals would, at most, merely regulate the relationship between a utility and an MTE owner, and in some cases adjust the existing contractual obligations of MTE owners and utilities in order to ensure nondiscrimination. Because the proposed rules regulate an MTE owner's *use* of

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22 *See, e.g.*, ALTS Comments, Attachment at 48-60; MCI WorldCom Comments at 15; Teligent Comments at 35-36; WinStar Comments at 38-50, 60-61, 63-64.

23 *See, e.g.*, Ameritech Comments at 2-4.

24 Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices: Television Broadcast, Multichannel Multipoint Distribution and Direct Broadcast Satellite Services, Second Report and Order, Second Report and Order, 13 FCC Rcd 23874, ¶ 18 (1998) ("OTARD Second Report and Order") (citing *FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987) and *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992)). *See also, e.g.*, MCI WorldCom Comments at 15-16; Teligent Comments at 41-46; WinStar Comments at 42-43.

25 *Loretto v. Teleprompter Manhattan CATV Corp.* 458 U.S. 419, 441 (1982).

26 *See, e.g.*, ALTS Comments, Attachment at 55; NextLink Comments at 13-17; Teligent at 54-60; WinStar Comments at 39-41.

27 *Pennsylvania Central Transportation Company v. City of New York*, 438 U.S. 104, 123-25 (1978). *See, e.g.*, Comments of Cincinnati Bell Telephone Company at 8, n.9.

28 *See, e.g.*, ALTS Comments at 22; MCI WorldCom Comments at 17; Teligent Comments at 54-55; WinStar Comments at 41-43.

its land by regulating the relationship between the MTE owner and a utility, there is no regulatory taking.[29] As the Commission has correctly noted in past proceedings, "[i]f a regulatory statute is otherwise within the power of Congress, . . . its application may not be defeated by private contractual provisions. For the same reason, the fact that legislation disregards or destroys existing contractual rights does not always transform the regulation into an illegal taking."[30] Section 224 provides a clear statutory right to reasonable and non-discriminatory access to MTEs, which is unquestionably within the power of Congress. Consequently, CompTel agrees with many parties that a nondiscriminatory requirement for access is not a regulatory, or *per se*, taking.[31]

Finally, the Commission should reject GTE's suggestion that *Bell Atlantic Telephone Companies v. FCC*[32] is applicable in the context of nondiscriminatory MTE access.[33] First, the *Bell Atlantic* decision, which applies only where the rule at issue would "necessarily constitute a taking," does not apply because nondiscriminatory access is not a taking.[34] Second, relying on the *Bell Atlantic* decision to adopt a narrow construction of Section 224 would be plainly contrary to Congress' intent to foster competition in the local exchange market by reducing entry barriers, and thus unwarranted.[35] Third, the *Bell Atlantic* decision is factually

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29 *See Yee v. City of Escondido*, 503 U.S. 519 (1992). *See also, e.g.,* ALTS Comments, Attachment at 56; NextLink Comments at 13-14. By regulating the relationship between an MTE owner and a utility, the Commission can prevent MTE owners from interfering with a CLEC's ability to piggyback the access rights of an ILEC, *see, e.g.,* Ameritech Comments at 3-4 (arguing that piggybacking will be ineffectual because MTE owners both practically and legally control building access), without effecting a taking.

30 OTARD Second Report and Order, ¶ 28. *See also, e.g.,* MCI WorldCom Comments at 18.

31 *See, e.g.,* ALTS Comments, Attachment at 48-60; MCI WorldCom Comments 15-18; NextLink Comments at 13-17; Teligent Comments 54-69; WinStar Comments at 41-46.

32 24 F.3d 1441 (D.C. Cir. 1994).

33 *See* GTE Comments at 22-23.

34 *See, e.g.,* Teligent Comments at 66; WinStar Comments at 44.

35 *See, e.g.,* Teligent Comments at 68-69; WinStar Comments at 44-45.

distinguishable. The *Bell Atlantic* decision involved a permanent, physical occupation of land where the owner was required to acquiesce to the occupation. By contrast, nondiscriminatory access requirements merely require MTE owners not to discriminate with respect to land they have voluntarily agreed to let an ILEC occupy. Moreover, nondiscriminatory access requirements do not expand the amount of land that an MTE owner has voluntarily allowed an ILEC to use. Therefore, the *Bell Atlantic* decision is inapplicable in the context of nondiscriminatory MTE access.[36]

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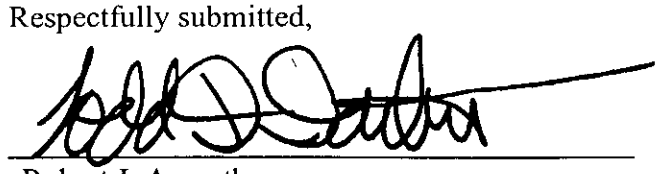
[36] *See, e.g.*, Teligent Comments at 64-74; WinStar Comments at 45-46. Similarly, the recent decision in *Gulf Power Co. v. United States*, 1999 U.S. App. Lexis 21574 (11th Cir. September 9, 1999) does not affect the Commission's proposals. That decision, in which the court concluded that 47 U.S.C. § 224(f) effects a taking of a utility's property but that it provides a constitutionally adequate process to ensure just compensation, simply reflects the fact that utilities must make their property available to other carriers. However, nothing in that decision affects the lawfulness of 47 U.S.C. § 224 or the Commission's proposals.

CONCLUSION

CompTel respectfully submits that the Commission should adopt the rules and policies that CompTel proposed in its initial comments.

Respectfully submitted,



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DATED: September 27, 1999

CERTIFICATE OF SERVICE

I, Marlene Borack, hereby certify that on this 27th day of September, 1999, a copy of the foregoing **REPLY COMMENTS OF COMPETITIVE TELECOMMUNICATIONS ASSOCIATION** was delivered by hand to the following:

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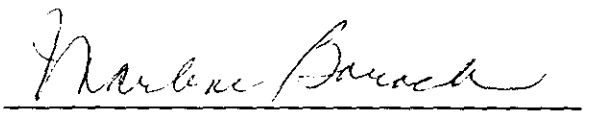

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